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REHEARING APR - 1 2003

ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION

MARC SPITZER
CHAIRMAN
JIM IRVIN
COMMISSIONER
WILLIAM A. MUNDELL
COMMISSIONER
MIKE GLEASON
COMMISSIONER
JEFF HATCH-MILLER
COMMISSIONER

Arizona Corporation Commission

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IN THE MATTER OF THE APPLICATION)
OF SUN CITY WATER COMPANY AND) DOCKET NO. W-01656A-98-0577
SUN CITY WEST UTILITIES COMPANY) DOCKET NO. SW-02334A-98-0577
FOR APPROVAL OF CENTRAL)
ARIZONA PROJECT WATER) **SUN CITY TAXPAYERS**
UTILIZATION PLAN AND FOR AN) **ASSOCIATION'S NOTICE OF**
ACCOUNTING ORDER AUTHORIZING A) **FILING APPLICATION FOR**
GROUNDWATER SAVINGS FEE AND) **REHEARING OF DECISION NO.**
RECOVERY OF DEFERRED CENTRAL) **65655**
ARIZONA PROJECT EXPENSES.)

Sun City Taxpayers Association ("SCTA"), by and through its attorney,
hereby files it's Application for Rehearing of Decision No. 65655.

Respectfully submitted this 12th day of March, 2003.

MARTINEZ & CURTIS, P.C.

By:

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Association

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15 FOR APPROVAL OF CENTRAL)
16 ARIZONA PROJECT WATER) **SUN CITY TAXPAYERS**
17 UTILIZATION PLAN AND FOR AN) **ASSOCIATION'S APPLICATION**
18 ACCOUNTING ORDER AUTHORIZING A) **FOR REHEARING OF DECISION**
19 GROUNDWATER SAVINGS FEE AND) **NO. 65655**
20 RECOVERY OF DEFERRED CENTRAL)
21 ARIZONA PROJECT EXPENSES.)

22 The Sun City Taxpayers Association ("SCTA") hereby applies for
23 rehearing of Decision No. 65655 dated February 20, 2003 (the "Decision"), pursuant
24 to A.R.S. § 40-253 and A.A.C. R14-3-111 for the reason that the Decision, and
25 portions thereof, are beyond the jurisdiction of the Arizona Corporation Commission
26 (the "Commission") and/or are not supported by substantial evidence.

27 In particular, SCTA contests the Commission's jurisdiction to
28 independently make the findings contained in Finding of Fact No. 14, as well as the
29 Commission's jurisdiction to "approve" the Groundwater Savings Project ("GSP")
30 outside of a ratemaking proceeding. This Application for Rehearing is supported by
31 the following Memorandum of Points and Authorities.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **A. THE COMMISSION'S JURISDICTION AND POWERS ARE**
3 **LIMITED**

4 The jurisdiction of the Commission is limited to those powers given it
5 by the constitution and statutes. *Walker v Deconcini*, 86 Ariz. 143, 341 P.2d 933
6 (1959). The powers of the Commission do not exceed those to be derived from strict
7 construction of the constitution and implementing statutes. *Southern Pacific Co. v.*
8 *Arizona Corp. Commission*, 98 Ariz. 339, 404 P.2d 692 (1965); *Burlington Northern*
9 *and Santa Fe Railroad RY., Co. v. Arizona Corp Commission*, 198 Ariz. 604, 12 P.3d
10 1208 (App. 2000). The court will not imply any power beyond that expressly
11 bestowed by the statute. *Id.*

12 **B. CONSTRUCTION OF THE WATER EXCHANGE AGREEMENT**
13 **EXCEEDS THE COMMISSION'S JURISDICTION**

14 "Clearly the construction of a contract is a judicial function and the
15 courts, not the Corporation Commission, have the jurisdiction to determine the
16 validity of said...agreement," *Trico Electric Cooperative v. Ralston*, 67 Ariz. 358,
17 365, 196 P.2d 470, 474 (1948). The *Trico* case involved an action by a utility's
18 consumers requesting declaratory relief adjudicating an option agreement to be
19 unlawful, illegal and void. The option agreement involved the sale of the entire
20 electric transmission and distribution lines and facilities and all water distribution
21 properties of the Eloy Light, Power & Utilities Company, which served the plaintiffs
22 to *Trico*. Much like the SCTA's action against the Rec Centers, the Plaintiffs in the
23 *Trico* case alleged *Trico's* articles of incorporation did not authorize entering into the
24 water business and thus *Trico* had no authority to execute the option agreement.
25
26

1 Before affirming the trial court's grant of relief to the members, the
2 court addressed the question of "whether the courts or the corporation commission has
3 the jurisdiction and power to determine the validity of said option agreement", 67
4 Ariz. at 361, 196 P.2d at 472, holding:

5 "In *Arizona Corporation Commission v. Tucson Gas and*
6 *Elect. L. & P. Co.*, 67 Ariz. 12, 189 P.2d 907, we in effect
7 held the commission had no judicial powers, except as
8 expressly given by the constitution; and in *Commercial*
9 *Life Ins. Co. v. Wright*, 64 Ariz. 129, 166 P.2d 943, 949,
10 we said: 'The Corporation Commission has no implied
11 powers and its powers do not exceed those to be derived
12 from a strict construction of the constitution and
13 implementing statutes.* * *'

14 Clearly the construction of a contract is a judicial function
15 and the courts, not the Corporation Commission, have the
16 jurisdiction to determine the validity of said option
17 agreement, although eventually the contract of sale, if
18 valid, must have the sanction and approval of the latter
19 before it becomes effective."

20 67 Ariz. at 365, 196 P.2d at 474. Finding of Fact No. 14, as written, might be
21 construed as an attempt by the Commission to construe "the agreement between the
22 Rec Centers and Arizona-American," but such judicial activity would exceed the
23 Commission, in violation of *Trico, supra*.

24 Additionally, the Commission has no jurisdiction to determine
25 conflicting water rights and cannot purport to license the wrongful exportation of
26 water. *Gammit v. Glenn*, 104 Ariz. 489, 491, 455 P.2d 967, 969 (1969) (denying
intervention to parties claiming their water rights were adversely affected by a CC&N
decision on the basis that the petitioners' water rights could not be impacted anyway).
Finding of Fact No. 14 might be construed as attempting to adjudicate whether the

1 water exchange and operating agreements constitute a "transfer" of vested water
2 rights. Such an adjudication is clearly beyond the Commission's jurisdiction and
3 violative of *Gammit, supra*.

4 Finally, as discussed at open meeting, no evidence or argument was
5 submitted on these issues, and the record does not factually support an independent
6 determination by the Commission of these facts.¹ Instead, such arguments were
7 addressed to the courts; the only entity having jurisdiction to determine whether the
8 Board of Directors breached the Articles of Incorporation and/or their fiduciary duty
9 by executing the Water Exchange Agreement and its associated Operating
10 Agreement. See, *Trico v. Ralston, supra*, and *Gammit v. Glenn, supra*.

12 SCTA also recognizes that, until overturned on appeal, the Commission
13 is bound by the final judgment of the trial court. See, generally, *Electrical Dist. No.*
14 *2, Pinal County, Arizona v. Arizona Corp. Commission*, 155 Ariz. 252, 258-259, 745
15 P.2d 1383, 1390-1391 (1987) (holding the Commission is bound by a final decision of
16 the Court of Appeals and the decision of the trial court involving the same parties
17 appearing before it). Therefore a recitation of the contents of the trial court's minute
18 entry is entirely appropriate.

19 In order to ensure that Finding of Fact No. 14 is stated in a manner
20 consistent with the Commission's jurisdiction and the evidence in the record, it is
21

22 ¹ Certainly the Commission was informed of the existence of a lawsuit and that a successful result
23 would impact the existence of a binding commitment and requested to continue the hearing on
24 this matter to allow the trial court an opportunity to rule on the motion to dismiss. But no
25 testimony was presented on the issue of whether the agreements constituted a relinquishment,
26 conveyance or transfer of the Rec Centers' vested groundwater rights, such as to require a vote
under the Rec Centers' Articles of Incorporation; such determination involve issues beyond the
Commission's jurisdiction in any event.

1 respectfully requested that rehearing be granted and Finding of Fact No. 14 either be
2 deleted or amended to read:

3 "Unless and until overturned on appeal, the Commission
4 is bound by the most recent ruling by the Superior Court
5 of Arizona, Maricopa County, in *Sun City Taxpayers*
6 *Association, Inc., et al. v. Recreation Centers of Sun City,*
7 *Inc., et al.*, Case No. CV2001-006415, Minute Entry, filed
8 November 21, 2001, including the provisions finding that
9 the agreement between the Rec Centers and Arizona-
10 American "does not transfer or in any way impair the
11 vested rights of RCSC" [the Rec Centers] ... Rather, the
12 agreement is a water exchange contract authorized by
A.R.S. § 45-1001. ... A relinquishment, conveyance or
transfer of RCSC's [Rec Centers'] groundwater rights
does not occur [because, if] CAP water becomes
unavailable, RCSC [Rec Centers] can resume groundwater
pumping immediately."

13 **C. APPROVAL OF THE GSP ALSO EXCEEDS THE**
14 **COMMISSION'S JURISDICTION**

15 An issue also exists as to whether the Commission's "approval" of the
16 GSP, exceeded its jurisdiction. Nowhere in the Application or in Decision No. 65655
17 is the basis of the Commission's jurisdiction "of the subject matter of the application"
18 set forth. After reviewing Article XV of the Arizona Constitution and Title 40 of the
19 Arizona Revised Statutes, SCTA has found no such express authority.

20 **1. The Nature of the Application**

21 The original Application in this matter was filed on October 2, 1998, in
22 response to Commission Decision No. 60172, dated May 7, 1997, wherein the
23 Commission denied the request to include CAP costs in rates because Arizona-
24 American's predecessor (Citizens Communications Company, hereinafter "Citizens")
25
26

1 was not utilizing CAP water in the provision of service to its customers. *Id.* at 10.
2 The Commission's determination that Citizens could continue to defer CAP costs for
3 potential future recovery from ratepayers was conditioned upon Citizens
4 implementing a CAP utilization plan on or before December 31, 2000. *Id.* The
5 Application sought Commission approval of an interim and long-term plan, as well as
6 a CAP cost recovery plan. By Decision No. 62293, dated February 1, 2000, the
7 Commission found the interim plan (recharge at the Maricopa Water District
8 Recharge Facility) "satisfy the requirements in Decision No. 60172 that CAP water
9 must be put to beneficial use prior to recovery from ratepayers." *Id.* at 19, Finding of
10 Fact 22".² Decision No. 62293 also approved the concept of the GSP proposed as a
11 long-term CAP utilization plan and ordered Citizens to file a preliminary
12 design/updated cost estimate with the Commission within six months. Decision No.
13 65655 was issued after hearings were conducted on the sufficiency of Citizens'
14 submittals made in response to Decision No. 62293.

15
16 No evidence has been presented indicating the existing facilities, service
17 or methods of distribution and supply are unjust, unreasonable, unsafe, improper,
18 inadequate or insufficient to meet the needs of the Company's consumers; nor has any
19 contention been made that the GSP, for which approval is sought, must be erected.
20

21 ² Decision No. 62293 also approved a CAP cost recovery plan without a finding of fair value.
22 Subsequently, *U.S. West Communications Inc. v. Arizona Corp. Commission*, 201 Ariz. 242, 34
23 P.3d 351 (2001); and *RUCO v. Arizona Corp. Commission*, 199 Ariz. 588, 20 P.3d 1169 (2001)
24 were entered invalidating orders that failed to contain a finding of fair value as an
25 unconstitutional exercise of the Commission's ratemaking authority. Based upon these
26 subsequent decisions, the grant of a CAP surcharge by Decision No. 62293 without a finding of
fair value exceeds the Commission's jurisdiction and is subject to collateral attack by special
action. *Tucson Rapid Transit Co. v. Old Pueblo Transit Co.*, 79 Ariz. 327, 289 P.2d 406 (1955);
Dallas v. Arizona Corp. Commission, 86 Ariz. 345, 346 P.2d 152 (1959).

1 The issue now presented is whether the Commission, has jurisdiction to "approve" the
2 GSP outside the context of a ratemaking proceeding.

3 **2. No Constitutional Authority Exists to "Approve" the GSP**

4 As set forth above, the powers of the Commission must be found in the
5 Arizona Constitution or state statutes. Its jurisdiction over public service corporations
6 is generally set forth in Article XV, Section 3 of the Arizona Constitution. Neither
7 Section 3 nor any other provision of Article XV expressly authorizes the Commission
8 to approve the CAP water implementation plan proposed by Arizona-American or to
9 "approve" water exchanges.³ Article XV, Section 3, however, does grant the
10 Commission plenary and exclusive jurisdiction to set rates. Article XV, Section 10,
11 declares water companies to be common carriers and "subject to control by law".
12 And, Article XV, Section 6, authorizes the Legislature to enlarge the powers and
13 extend the duties of the Corporation Commission. Therefore, it is appropriate to
14 examine the Commission's ratemaking power, as well as Title 40 of the Arizona
15 Revised Statutes to determine whether the Commission has been vested the power to
16 approve the GSP.
17

18 **3. No Statutory Authority Exists to "Approve" the GSP**

19 **a. The Commission's Ratemaking Jurisdiction is not**
20 **Invoked by Decision No. 65655**

21
22 There is no question that the Commission has exclusive and plenary
23 jurisdiction over the ratemaking of public service corporations. *Pueblo Del Sol Water*
24 *Co. v. Arizona Corp. Commission*, 160 Ariz. 285, 772 P.2d 1138 (App. 1988).

25 ³ The Arizona Department of Water Resources, pursuant to Chapter 4 of Title 45, A.R.S. is
26 delegated responsibility to "approve" water exchanges.

1 Decision No. 65655, however, does not involve ratemaking. If such were the case,
2 the Commission would be required to make certain findings, including the fair value
3 of the property devoted to rendering service to Arizona customers. See, Article XV,
4 Section 14; *U.S. West Communications, Inc., supra*. In fact, the Decision's second
5 ordering paragraph expressly and properly defers the issue of cost recovery to a
6 subsequent ratemaking proceeding.

7
8 b. The Commission's Powers Over Financing are not
9 Invoked by Decision No. 65655

10 While A.R.S. § 40-301, *et seq.*, vests the Commission with power to
11 approve issuance of indebtedness and determine whether the issue is for lawful
12 purposes, which are within the corporate powers of the applicant, are compatible with
13 the public interest, with sound financial practices, and with proper performance by the
14 applicant of service as a public service corporation and will not impair the applicant's
15 ability to perform that service, Decision No. 65655 does not involve the issuance of
16 any form of indebtedness or any lien on utility property. These provisions, therefore,
17 do not vest jurisdiction in the Commission to "approve" the GSP.

18 c. The Commission's Powers Over Facilities are not Invoked
19 by Decision No. 65655

20 A.R.S. §§ 40-321 and 40-331 vests the Commission with the authority
21 to determine whether the equipment, appliances, facilities or services of any public
22 service corporation for the methods of manufacture, distribution, transmission, storage
23 or supply employed by a public service corporation are unjust, unreasonable, unsafe,
24 improper, inadequate or insufficient and to prescribe changes in the facilities,
25 including additions, improvements or changes in plant. However, in the instant case,
26

1 no evidence was presented or finding made that the current facilities are unsafe,
2 inadequate or insufficient. If such findings were made and supported by the record,
3 and the GSP was found necessary to remedy the situation, these statutes would
4 authorize the Commission to compel Arizona-American to implement the GSP. But
5 nothing in these statutes provide jurisdiction for the Commission to merely "approve"
6 construction of specific plant where sufficient service is being provided.

7
8 d. An Order of the Commission Approving the GSP is
9 Surplusage Without a Jurisdictional Basis

10 By granting a certificate of convenience and necessity, pursuant to
11 A.R.S. § 40-281, *et seq.*, The Commission has already authorized the construction of
12 lines, plant, service or system or any extension thereof. Approval of the GSP through
13 Decision No. 65655 serves no legitimate purpose and, as discussed above, there is no
14 jurisdictional basis to support it.

15 **D. REQUESTED REMEDY ON REHEARING**

16 SCTA believes the Commission can remedy the jurisdictional defects in
17 Decision No. 65655 by making the following changes:

- 18 1. Page 26, lines 10-11, delete from "Company's" to the end
19 of the sentence, and insert, "Company has satisfied the requirements of Decision No.
20 65655";
 - 21 2. Page 28, lines 12-13, delete Finding of Fact No. 13;
 - 22 3. Page 28, lines 14-21, either delete Finding of Fact No. 14
23 entirely or amend it, as set forth above;
 - 24 4. Page 29, line 5, delete Conclusion of Law No. 5;
- 25
26

1 5. Page 29, lines 4-5, amend Conclusion of Law No. 6 to
2 read, "Because no ratemaking action is permissible apart from a finding of fair value,
3 rate recovery of GSP costs, if any, will be considered by the Commission in an
4 appropriate rate recovery proceeding; and

5 6. Page 29, line 9, amend the first ordering paragraph by
6 deleting "is approved" and adding "satisfies Decision No. 62293".
7

8 **E. CONCLUSION**

9 In adopting Finding of Fact No. 14 and approving the GSP, the
10 Commission acted in excess of its jurisdiction. Modification of the Decision as set
11 forth above would remedy the defects.

12 WHEREFORE, it is respectfully requested the rehearing be granted for
13 the limited purpose of making the foregoing amendments to the Decision.

14 Respectfully submitted this 12th day of March, 2003.

15 MARTINEZ & CURTIS, P.C.

16
17
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1 Original and fifteen (15) copies filed this 12th day of March, 2003 with:

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